Brussels, 24 May 2000

CHARTE 4314/00

CONTRIB 181

COVER NOTE
Subject : Draft Charter of Fundamental Rights of the European Union

Please find hereafter the submission by the Association of Women of Southern Europe (AFEM) given at the hearing on 27 April 2000. ¹

¹ This text has been submitted in English and French languages.
Mr. President, Ladies and Gentlemen Members of the Convention.

The Association of Women of Southern Europe (AFEM), a federation of French, Italian, Spanish, Portuguese and Greek NGOs, wishes to thank you for honouring it with a hearing.

AFEM has been among the first NGOs to submit concrete proposals to the Convention (CONTRIB 16, 42, 55 and 105), which are endorsed by:

- the European Women’s Lobby;
- the International Alliance of Women (IAW), the oldest international federation of NGOs for gender equality (founded in 1902), enjoying 1st category consultative status with the UNO and all its specialised agencies (ILO, UNESCO etc) and with the Council of Europe;
- the Marangopoulos Foundation for Human Rights, international NGO enjoying 1st category consultative status with the UNO, the UNESCO and the Council of Europe and entitled to submit complaints under the Additional Protocol to the European Social Charter (1995);
- the International Committee of Liaison of Women’s Associations (CILAF), NGO enjoying consultative status with the Council of Europe;
- the Greek League for Women’s Rights, NGO associated with the Public Information Department of the UNO.

**CONVENT 13 - CIVIL AND POLITICAL RIGHTS**

The fundamental principle of substantive gender equality in all areas.

1. AFEM welcomes the Praesidium’s proposal for a provision on gender equality (CONVENT 8) and for an Article on gender equality in matters of employment and social protection (CONVENT 18).

However, according to well-established ECJ case law and by virtue of the Treaty, gender equality is a fundamental principle of Community law - a fundamental human right - a task and an objective of the EC.

The Treaty imposes on the EC the positive obligation to “promote” gender equality, i.e. not to be satisfied with formal equality but to strive for achieving substantive equality “in all is activities”.

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1 Represented by Sophia SPILOTOTOULOS, attorney at law, independent expert of the European Commission in matters of gender equality, vice-president of AFEM.
3 See also EU Annual Report on Human Rights (1999), para. 5.12.
Substantive gender equality is a universal principle. It is also enshrined in treaties, which are ratified by all Member States, such as the UN Covenants\(^4\) and the Convention on the Elimination of Discrimination against Women (CEDAW), recently endowed with a Protocol allowing individual complaints (whose adoption has been supported and whose entry in force is being promoted by the EU\(^5\)), as well as by the European Social Charter (revised) (Article 20).

The EU considers substantive gender equality as a strict requirement for accession, in accordance with Article 49 EU Treaty, and is promoting it actively within the framework of its co-operation with third countries\(^6\).

2. - We welcome the proposal of Mr. Guy BRAIBANT (CONTRIB 63, Article I) to proclaim this general principle in all areas, due to its importance, by one of the first Articles of the Charter, and then to apply it in matters of economic and social rights. This proposal reinforces the coherence of the Charter. It should serve as a basis and be complemented by our proposal.

3. - Consequently, a specific Article, implementing the Community and international “acquis” and imperatives, should be included among the first ones of the Charter. This Article should read as follows (see our CONTRIB 105):

“1. Substantive equality between women and men must be ensured and applied in all areas; any direct or indirect discrimination on the ground of sex is prohibited.”

“2. Temporary positive measures are indicated, in order to improve, in the first instance, the position of women, until substantive equality between women and men is achieved.”

These provisions should be repeated in matters of social rights (CONVENT 18, Article I) and citizen’s rights [CONVENT 17, Article A(2)], with the necessary adaptations (see infra).

4. - Sex differs fundamentally from the other grounds of discrimination. Discrimination on the ground of sex is of a particular nature. It is due to prejudice that has infiltrated social and economic structures and affects mainly women.

Women are neither a minority nor a group, but one of the two forms in which the human being is incarnated. Yet, they still suffer discrimination, in all areas, which infringes upon their dignity and is often multiple, on the ground of sex and on other grounds.

This situation is deplored by Community and international institutions, which also acknowledge that general non-discrimination clauses do not suffice to remedy it\(^7\). It has necessitated provisions

\(^4\) Covenant on Civil and Political Rights (Article 3); Covenant on Economic, Social and Cultural Rights (Article 3).

\(^5\) See EU Human Rights Report, op. cit., para. 5.12.


\(^7\) See EU Human Rights Report, op.cit., para. 5.12; Preamble to the Convention on the Elimination of Discrimination against Women; UN Commission on the Status of Women, Press release WOM/1117, 12.3.1990, relating to the Protocol to this Convention, which provides for individual complaints, see website: http://un.org.
and even treaties whose sole object is gender equality or women’s rights, as well as other appropriate measures.\(^8\)

This situation calls for temporary positive measures. These do not constitute discrimination but means for achieving substantive or de facto gender equality, according to Article 4(1) of the Convention for the elimination of discrimination against women and Article 141(4) EC Treaty. Declaration No 28 annexed to the Amsterdam Treaty specifies that these measures “\textit{should, in the first instance, aim at improving the situation of women}”. Provisions on positive action are, moreover, increasingly included in national Constitutions\(^9\) (a common constitutional tradition being thus formed) and are recommended by Community\(^10\) and international\(^11\) institutions.

The particular nature of discrimination against women and the aforementioned character of positive action were confirmed by the ECJ in \textit{Badeck} (C-158/97 26.3.2000)

5. - By a Declaration of 17 March 2000 (CONTRIB 55) our General Assembly has requested that “\textit{the fundamental right to substantive gender equality in all areas}” be enshrined in one of the first Articles of the Charter, as an absolute right.

We thank Mr. Inigo MENDEZ DE VIGO, President of the EP Delegation and Vice-President of the Convention and Ms Catherine LALUMIERE, MEP and member of the Convention, former Secretary General of the Council of Europe, for having welcomed this Assembly at the EP where the “Strasbourg Meeting”\(^12\) took place, as well as for their support to our undertaking. We also thank Ms Pervenche BERÈS, Ms Fiorella GHILLARDOTTI, Ms Elena PACIOTTI, MEPs and members of the Convention, Ms Joke SWIEBEL, Ms Maria-Antonia AVILES-PEREA, Ms Sylviane AINARDI, Ms Geneviève FRAISSE, Ms Ilda FIGUEIREDO, Ms Marie-Hélène GILLIG, Ms Maria IZQUIERDO ROJO, Ms Cristiana MUSCARDINI and Ms Elena VALENCIANO, MEPs, for their participation in this “Meeting” and their support.

\textbf{Article 3(2): Right to respect and protection of integrity:} (our CONTRIB 105, Article 3): There should be an absolute prohibition of eugenic practices, of the cloning of human beings and of the “\textit{trafficking}” in human beings, in their body or in parts thereof, whether transnational or not. It should be specified in all cases that \textit{the consent of the person concerned is irrelevant.}

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\(^8\) Such as Community Action Programmes for gender equality; the 5\(^{\text{th}}\) Programme (2001-2005) will cover all areas of Community jurisdiction. See \url{http://europa.eu.int/comm/dg05}.

\(^9\) Constitutions of Germany [Art. 3(2)], Austria [Art. 7(2)], Portugal [Art. 9(h)], Finland [Art. 6(4)], Sweden [Chapter 2 §16], France [Art. 3, 4], Greece (draft).


\(^12\) Organised by AFEM, on 16 March 2000, under the auspices of the EP, with the support of the European Commission and the French Government, on the subject: “From the Treaty of Amsterdam to the Charter of Fundamental Rights: what is at stake for women’s rights”.

Trafficking, in particular of women and children with a view to sexual exploitation and/or exploitation of their labour, is a major concern of the EU (see Conclusions of the Tampere European Council which has established your Convention)\textsuperscript{13}.

**Article 4: Prohibition of torture and inhuman or degrading treatment or punishment.** “Sexual mutilation and any other kind of physical or moral violence, including violence within the family”, whose victims are mostly women and children - also a major concern of the EU\textsuperscript{14} - should be expressly prohibited (our CONTRIB 105, Article 4).

**Article 8. Right to a “fair trial”**: This title, which appears in the English text and corresponds to the title of Article 6 ECHR, is preferable to that of “impartial tribunal”, which appears in the French text. What has to be guaranteed is the right to “real and effective judicial protection”, a fundamental right, according to ECJ case law. A non exhaustive mention of the content of this right should be added after the 1\textsuperscript{st} sentence of the Article, in accordance with the case law of the EurCourt H.R and the ECJ\textsuperscript{15} (effective access to justice, effective judicial control, real and effective sanctions, execution of final judgments), or at least be included in the statement of reasons (see our CONTRIB 42, Article 4).

The right of NGOs to lodge any complaint or judicial proceedings or to support those lodged by a person who alleges a violation of his/her rights should be added (see our CONTRIB 42, Art. 4).

**Article 13. Family life**: See our proposal (CONTRIB 42, Article 9) which is based on Article 12 ECHR, Article 5 of its Protocol No 7, Article 23 of the Covenant CPR and the Convention on the Rights of the Child.

**Article 16(3):** “The right of parents to have their children educated and taught in accordance with their religious and philosophical convictions shall be guaranteed, to the extent that the latter do not contravene the values and rights recognised by this Charter. In exercising this right parents shall act in the child's best interest” (see our CONTRIB 105 and CONTRIB 97 by Mr. G. PAPADIMITRIOU).

**CONVENT 8**

**Article 17: Right of asylum**: This right should be recognised to all persecuted persons, even EU nationals, including those who are “unable to freely dispose of themselves or whose freedom or fundamental rights or physical or psychological or genetic integrity are threatened, whether the authorities of the country of origin are the authors of such persecution or threats or they tolerate them or are unable to oppose them” (our CONTRIB 42, Article 17).


\textsuperscript{14} Ibid.

\textsuperscript{15} See ECJ cases in our CONTRIB 42, fn 11.
- We agree to all other Praesidium proposals for civil and political rights.

**CONVENT 17 - RIGHTS OF CITIZENS**

**Article A (2):** “equality between women and men” should be added (see supra No 3 i.f. and our CONTRIB 105, Article A), as well as “solidarity” (see CONTRIB 144 by Mr. Jürgen MEYER).

- We agree to all other Praesidium proposals for citizen’s rights.

**CONVENT 18, 19 et 26 - SOCIAL RIGHTS**

Let us recall the official and solemn declarations of the EU, according to which:

- “economic success cannot be ensured unless human rights are observed and guaranteed”;
- the EU “insists” on the “universality”, the “equivalence”, the “indivisibility”, the “interdependence” and “inter-relatedness” of all human rights, including economic, social and cultural rights whose effective respect it wishes to promote.\(^{16}\)

**Article I, Substantive equality between women and men:** See our proposal (CONTRIB 105, Art. I), which repeats the general principle of gender equality (supra) and which also implements the *acquis communautaire* in matters of social rights (Art. 141 EC Treaty, Equality Directives).

**Article VIII: Rights of children:** children should be not only objects of protection, but furthermore subjects of rights (see Convention on the Rights of the Child). Our proposal (CONTRIB 105, Art. VIII):

1\(^{st}\) paragraph: General principle (Article 6 Finnish Constitution, proposal by Mr. Paavo NIKULA).

2\(^{nd}\) paragraph: Any rights that do not presuppose the age of majority should be mentioned. The paragraphs of CONVENT 18 should follow.

**Article XI: Right to maternity protection:** It is inherent in the human dignity and of capital importance for the very survival of Europe. Consequently, it should be recognised to all women and be wider than maternity leave, so that account is also taken of the *acquis communautaire*\(^{17}\). Minimum length of leave: reference to Community law each time in effect (see our proposal, CONTRIB 105, Art. XI).

**Article XII. Rights of parents:** What is said above under Article XI, applies also to these rights, as well as to the length of parental leave. It should also be added that “the organisation of working time must guarantee to women and men the conciliation of professional and family life”\(^{18}\) (See our CONTRIB 42, Article 23, and our CONTRIB 105, Article XII).

**Article XIV. Right to social assistance:** It would preferable to provide that “all persons have the right to a sufficient and decent level of life, for themselves and their family, and to protection against social exclusion” (our CONTRIB 42, Art. 24; cf. CovenantESCR, Art. 11; Social Charter, Art. 30).

\(^{16}\) EU Report on Human Rights, op.cit., paras. 5.1, 5.2; Statement by Mr. J. Fischer on behalf of the EU to the UN Human Rights Commission, annexed to this Report.

\(^{17}\) Articles 137 (1) 1\(^{st}\) indent, and 152 EC Treaty; Directives 92/85 and 76/207; ECJ case law.

Article XV. Right of access to health care: “in case of sickness or pregnancy”.

- We agree to all other Praesidium proposals for social rights.

**CONVENT 27. HORIZONTAL CLAUSES**

**Article H.1. Material Scope:** “The provisions of this Charter are addressed to the institutions and bodies of the Union and the Community… and also to the Member States, when they act within the scope of Community law” or “within the area of Union and Community jurisdiction”. These expressions respect the division of jurisdiction, as well as the acquis communautaire in matters of fundamental rights. See speech of Judge Vassilios SKOURIS, representative of the ECJ (BODY 1, ANNEX V) and the statement of reasons for this Article¹⁹.

The expression used in CONVENT 27 (“exclusively within the framework of implementing Community law”) may lead to misunderstandings and to regression in relation to Community law. It should be clear that fundamental rights should be respected in all areas of jurisdiction that the Member States have yielded to the EU and the EC, even when the Member States do not implement EC or EU law or when they implement it incorrectly.

**Personal scope:** See our proposal (CONTRIB 42): “everyone within the jurisdiction of the EU, the EC and the Member States”.

Several speakers as well as Members of the Convention have underlined the necessity to provide for obligations of individuals. It is to this concern that responds our proposal that, at least civil and political rights, as well as the majority of social rights, including those to gender equality, to maternity protection and to the protection of parents, as well as all other rights which constitute the acquis communautaire, may also be relied upon “as against individuals”.

**Article H.2. Limitations.** We welcome the 1st paragraph, which constitutes an advance in relation to Article X of CONVENT 13, by providing for certain absolute rights. These should, in any event, include the rights to dignity, life, integrity, gender equality, as Mr. Guy BRAIBANT proposes (CONTRIB 153) (cf. our CONTRIB 105, Art. X).

**Article H.4. Level of protection.** We welcome this Article, which constitutes also an advance in relation to CONVENT 13 (Article Y), since it specifies that the Charter contains minimum standards in relation to national and international law and to all international conventions ratified by Member States.

However, reference to “Union law” may create confusion, since “Community law” is not mentioned, as well as in view of the incorporation of the Charter in this law. Consequently, in order to safeguard the, eventually higher, level of EC and EU provisions other than those of the Charter, it would be preferable to refer to “any other provision of Community and Union law”.

**RIGHT TO INFORMATION:** See our proposal (CONTRIB 42, Article 26), which is inspired by the Equality Directives ²⁰ and responds to the requirement of visibility of the rights: “The Union and the Community as well as the Member States ensure that the provisions of the present Charter are brought to the knowledge of the persons whose rights they guarantee, by all appropriate and effective means. These persons have the right to be informed thereof.”

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¹⁹ See also ECJ Case C-299/95 Kremzow [1997] ECR I-2637.
• **LINGUISTIC MATTERS:** AFEM had asked the Convention to kindly note that the expressions used should be sex neutral (e.g. “person”) or should refer to both sexes (e.g. he/she, his/her). AFEM now welcomes the use of the expressions he/she in CONVENT 26 (Article XVI).

• **FINAL DECLARATION:** AFEM supports:
  - the Common Statement of the Forum of Civil Society,
  - the proposal of EURONET on the rights of children.

Mr. President, Ladies and Gentlemen Members of the Convention.

AFEM thanks you for your attention and for your efforts to promote and guarantee fundamental rights in Europe. By adopting the Charter that you are elaborating, the EU will prove its dedication to the universal principles proclaimed by Article 6(1) EU Treaty and its determination to ensure that neither this provision nor those of Articles 7 and 49 of this Treaty become dead letter. It will thus confirm that it really wants to be a Community based on the rule of law and will strengthen its credibility both with its citizens and the international community.

The fear expressed by some people that this Charter might create case law conflicts between the Strasbourg and the Luxembourg Court is not justified. Fundamental rights have been already introduced in Community law, as binding norms, by ECJ case-law. This case-law, which has not created any conflict, will continue to develop, even in the absence of a Charter, and nothing can stop it. It is the “visibility” of fundamental rights, i.e. their greater effectiveness in our everyday life, that will be promoted by the Charter, in accordance with the mandate of the European Council that you are implementing by your authority.

AFEM wishes you a successful completion of your task.

Tel: 33-1-45 72 12 03. Fax: 33-1-45 72 15 03. E-mail: assafem@aol.com
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